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SENATE

REPORT
No. 98–190

THE ARMED CAREER CRIMINAL ACT OF 1983

JULY 20 (legislative day, JULY 18), 1983.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 52]

The Committee on the Judiciary, to which was referred the bill (S. 52), to combat violent and major crime by establishing a Federal offense for continuing a career of robberies or burglaries while armed and providing a mandatory sentence of life imprisonment, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

I. AMENDMENT IN THE NATURE OF A SUBSTITUTE TO S. 52

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Armed Career Criminal Act of 1983".

SEC. 2. Chapter 103 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 2118. ARMED CAREER CRIMINALS

"(a) Whoever carries a firearm during the commission of an offense described in subsection (c) of this section or commits such an offense with another who carries a firearm during the commission of such offense, or attempts or conspires to do so, shall be fined not more than $25,000 and imprisoned not less than fifteen years.

"(b) An offense under this section shall not be prosecuted unless the United States proves beyond a reasonable doubt that the defendant has been convicted of at least two offenses described in subsection (c) of this section.

"(c) The offense referred to in subsections (a) and (b) of this section is any robbery or burglary offense, or a conspiracy or attempt to commit such an offense, which may be prosecuted in a court of any State or of the United States and which is punishable by a term of imprisonment exceeding one year.

"(d) Notwithstanding any other provision of law—

"(1) any person charged with an offense under this section shall be treated in accordance with the provisions of section 3148 of this title;

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"(2) the indictment or the information need not contain allegations pertaining to or references to subsection (b) of this section;

"(3) the issue of whether the United States has fulfilled its burden of proof beyond a reasonable doubt under subsection (b) of this section shall be heard and decided by the court before trial; and

"(4) the court shall not sentence the defendant to probation, nor suspend such sentence, and the defendant shall not be eligible for release on parole before the end of such sentence.

"(e) For purposes of this section—

"(1) 'State' means any State of the United States, any political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States;

"(2) 'firearm' has the meaning set forth in section 921 of this title;

"(3) 'robbery offense' means any offense involving the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury; and

"(4) 'burglary offense' means any offense involving entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense.

"(f) Except as expressly provided herein, no provision of this section shall operate to the exclusion of any other Federal or State law, nor shall any provision be construed to invalidate any other provision of Federal or State law.".

SEC. 3. The table of sections at the beginning of chapter 103 of title 18 of the United States Code is amended by adding at the end thereof the following new item:

"2118. ARMED CAREER CRIMINALS.".

SEC. 4. It is the intent of Congress that—

(a) the trial and appeal of any person prosecuted under section 2118 of title 18, United States Code, as added by this Act, shall be expedited in every way;

(b) this section shall not create any right enforceable at law or in equity in any person; and

(c) armed robbery and burglary offenses should ordinarily be prosecuted by the States and that prosecutions under section 2118 of title 18, United States Code, as added by this Act, should take place only where circumstances justify exceptional handling. An offense under this section shall not be prosecuted unless the appropriate State prosecuting authority requests or concurs in such prosecution and the Attorney General or his designee concurs in such prosection.

II. PURPOSE

The purpose of S. 52 is to begin to employ Federal prosecutorial resources against violent crime committed by hardened and frequent offenders. Those career criminals with two or more prior convictions for robbery or burglary who then carry a firearm while committing yet another robbery or burglary will be eligible for prosecution in Federal court. The expected advantages include: (1) faster trials; (2) more restrictive bail; and (3) longer, surer sentences.

III. HISTORY OF THE LEGISLATION

S. 52 was introduced by Senator Arlen Specter on January 26, 1983, and referred to the Committee on the Judiciary. The Committee held a hearing on the bill on May 26, 1983, at which James Knapp, Deputy Assistant Attorney General, and William Cahalan, prosecuting attorney for Wayne County, Mich., testified. The Committee ordered the bill reported favorably, with an amendment in the nature of a substitute, with one objection, on June 16, 1983.

S. 52 is substantially similar to S. 1688, which was passed by the Senate on September 30, 1982, by a vote of 93–1. That bill had been the subject of extensive hearings by the Subcommittee on Juvenile Justice on October 26, 1982, December 10, 1981, January 28, 1982, and March 18, 1982. The Administration endorsed the bill through Assistant Attorney General Jensen's testimony on March 18, 1982. The Subcommittee reported the bill without objection on June 3, 1982, and the Committee on the Judiciary favorably reported S. 1688 on September 24, 1982.

Following Senate passage, the bill became part of a larger crime package, H.R. 3963, and was passed by both the House and Senate on December 20, 1982. President Reagan declined to sign the package and, on January 14, 1983, announced that his disapproval was primarily due to his objection to an unrelated portion of the package. He also expressed concern about the jurisdictional nature of the local prosecutor's "veto" power over Federal prosecutions contained in the career criminal portion of the bill.

In response to the Administration's objection, the requirement of the local prosecutor's request or concurrence has been moved to the "intent of Congress" section in S. 52. Other technical changes were made as well, partly in response to the Department of Justice's suggestions.

IV. Statement

The bill creates a new Federal crime of carrying a firearm during the commission of a robbery or a burglary, or participating in such an offense where an accomplice carries a firearm, where a defendant has two prior felony convictions for robbery or burglary. Upon conviction in Federal court, a defendant must receive a mandatory sentence of at least 15 years, without the option of a suspended sentence, probation, or parole. Recognizing that prosecution of such offenses is primarily a state and local concern, the bill indicates a clear Congressional intent that no Federal prosecution be brought absent the request or concurrence of the local prosecutor.

Need for the legislation

The need for special attention to career robbers and burglars can be demonstrated both by crime statistics and by public opinion polling done in recent years. Violent crime has become worse. Robbery and burglary are more prevalent and have increased faster than any other type of violent crime. In general, the incidence of violent crime in America doubled in the last twenty years. Moreover, since 1978, there has been a sharp upsurge following a period in the mid-seventies when crime rates stabilized.

ROBBERIES

The number of robberies per year has risen 42 percent from 1977 to 1981, the last year for which comprehensive statistics on reported crime are available.[1] There were 574,134 robberies reported to police in 1981. The rate of robberies has increased 34 percent in the same four-year period. From 1980 to 1981, the rate of robberies increased three percent.

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[1] Federal Bureau of Investigation, "Uniform Crime Reports: Crime in the United States" 16 (1981).

Measuring all the costs of robberies is difficult. Counting only the value of money and property stolen through robbery, the Uniform Crime Reports for 1981 reflected a total national loss of approximately $382 million. The average loss per robbery was about $665.[2]

The full financial costs of robbery, of course, are much greater. When one adds the financial costs of days of work missed by injured robbery victims, the full extent of the harm caused by robbery becomes clearer. According to the National Crime Survey Report, published in 1980, nearly 75 percent of the robbery victims miss at least six days of work. In fact, just over 50 percent missed at least 1–5 days of work.[3]

Fortunately, the percentage of robbery victims who sustain actual physical injury is relatively small. According to the Survey Report, 31.8 percent of all robbery victims sustained some physical injury. Seven percent of the robbery victims incurred medical expenses.[4]

A large number of robbers use firearms. The Criminal Victimization Survey for 1978 estimated that in that year firearms were used in 31 percent of all robberies.[5] The UCR for both 1980 and 1981 reflect that firearms were used in 40 percent of all robberies.

BURGLARIES

The volume of burglaries is even more dramatic than the number of robberies. In 1981, police organizations in the United States received reports of 3,739,821 burglaries. The rate for reported burglaries per 100,000 population was 1,632. Thus, there are more than six times as many burglaries as robberies. As with robberies, the number of burglaries climbed steadily in the late 1970's. From 1977 to 1981, the burglary rate increased 16 percent.

Losses from money and property stolen in burglaries in 1980 were reported at $3.3 billion. The average loss for a burglary was $882 in 1980. What cannot be readily calculated are the millions or billons of dollars in insurance rates which are attributable to payment of claims for burglaries. Furthermore, there are no readily available statistics to reflect the nationwide expenditures for extra locks, alarm systems and other security devices and services.

BURGLARIES ARE POTENTIALLY VIOLENT CRIMES

While burglary is sometimes viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises.

The notorious case of Washington heart surgeon, Dr. Michael Halberstam, illustrates this point. Dr. Halberstam arrived home with his wife during the course of a burglary by a career criminal named Bernard Welch. Welch had been previously convicted numerous times and had committed several hundred burglaries in the Washington area. Welch was armed. When Dr. Halberstam surprised Welch inside the home, Welch shot and killed him.

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[2] Id.
[3] Bureau of Justice Statistics, "National Crime Survey Report" 70 (1980).
[4] Id. at 59–60.
[5] Bureau of Justice Statistics, "Criminal Victimization Survey" 57 (1978).

ROBBERIES AND BURGLARIES ARE THE MOST NUMEROUS FELONIES

The prevalence of robbery and burglary as the most common violent street crimes is undeniable. Burglaries are 40 times more common than rapes, and robberies are seven times more common than rapes. In turn, rape is far more common than kidnapping or murder. Therefore, in terms of the likelihood of being victimized, burglary is the primary threat, followed by robbery.

LAW ENFORCEMENT RESOURCES DECLINE WHILE CRIME RISES

Law enforcement resources are being decreased at the very time that violent crime is increasing sharply. Although the President supported increases in Fiscal Years 1983 and 1984, Federal law enforcement resources decreased about 7 percent from 1981 to 1982. Moreover, in many major cities, the decrease in resources in recent years has been far greater. For example, in New York City, there are one-third fewer policemen than a few years ago.

Even special police squads dealing with robbery and burglary have been cut, despite the increase in these offenses. For example, in Washington, D.C., the incidence of robbery has nearly doubled in the last few years. However, the size of the robbery squad has been decreased from 43 to 28 men. The decreases reflect severe budget pressures, particularly in the older cities with ailing economies.

MOST ROBBERIES AND BURGLARIES ARE COMMITTED BY CAREER CRIMINALS

It is now well-documented that a small number of repeat offenders commit a highly disproportionate amount of the violent crime plaguing America today. Recent scholarly studies generally establish that approximately six percent of the offenders commit between 50 and 70 percent of the violent crime. The same studies indicate that true career criminals commit such offenses with extremely high frequency. For example, career robbers may engage in 40 or 50 robberies per year while career burglars often commit well over 100 offenses per year. Many career offenders commit crimes such as robbery, burglary and drug sales at a rate of about one per day.

Three major pioneering studies on recidivism and career criminals have been conducted by the Rand Corporation. Unlike most earlier efforts, which relied on arrest records to establish the crime pattern of a particular offender, the Rand studies relied on admissions by the defendants themselves. For example, the second study, "Doing Crime: A Survey of California Prison Inmates," by Mark A. Peterson (Santa Monica, California: 1980), focused on a representative sample of California State prison inmates serving substantial prison terms on the basis of various convictions. Each inmate was closely questioned about offenses he had committed prior to his incarceration. On the basis of these admissions, the author estimated that in the one year on the street immediately preceding the arrests and convictions on which their imprisonment was based, 100 of these offenders convicted at some time of robbery would have committed 490 armed robberies. 720 burglaries and approximately 4,000 other serious offenses.[6] In other words, the

[6] Peterson, supra at x.

typical offender in this group in the prior year of streeet time would have committed five armed robberies and seven burglaries. These career criminals tended to commit robberies and burglaries interchangeably.

THE STATE COURTS ENCOUNTER OBSTACLES IN DEALING WITH SOME CAREER CRIMINALS

Numerous studies contain strong evidence that robbers and burglars move in and out of the criminal justice system repeatedly, and that the system does not control or prevent their criminal activity. In her article, "Mandatory Prison Sentences: Their Projected Effect on Crime and Prison Populations," Joan Petersilia revealed that 60 percent of those arrested for robbery have a prior felony conviction.[7]

A Vera Institute of Justice study on robbery cases in New York City showed that 74 percent of all persons arrested for robbery had prior records.[8] Another study of robbery statistics in New York City found that of all persons arrested for robbery in New York City, only 14 percent had not been previously arrested for a felony.[9] The figures for burglary are similar. For example, of all persons arrested in the test period for burglary in New York City, more than two-thirds had prior felony arrests.[10]

New York City is not at all exceptional with regard to such statistics on recidivism. In Washington, D.C., a detailed study by the Institute for Law and Social Research performed for the National Institute of Justice in 1977, reflected the same kind of "revolving door" phenomenon. In 1974, approximately one-third of the persons arrested for robbery and one-third of the persons arrested for burglary were at the time of their arrest on "conditional release," i.e., release on bail, probation, or parole after serving part of the sentence. Indeed, 23 percent of the defendants under indictment in the Federal court in Washington at the time had other cases pending in the Federal or local court.[11]

The basic fact which leads to this kind of "revolving door" is that in many jurisdictions, the sentencing of felons is insufficient. The Vera Institute study cited above, which was limited to felony arrests, demonstrates this phenomenon with just a very few statistics. Of those persons arrested for felonies who had prior convictions, but had served no time, 42 percent received no jail sentences; 56 percent received only misdemeanor sentences (under two years); and only 2 percent received felony sentences (more than two years). Of those convicted of felonies who had prior convictions and who did serve jail sentences, 16 percent received no prison time, 56 percent received misdemeanor sentences, and 28 percent received felony sentences.[12]

How can felony arrests so often result in misdemeanor sentences or no sentences at all? The answer can be found by looking at the statistics in New York City. In 1979, a total of 539,000 felonies were re-

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[7] J. Crim.L.C. 604–605 (1978).
[8] Vera Institute of Justice, "Felony Arrests: Their Prosecution and Disposition in New York City's Courts 63 (1977)."
[9] Shimmer & Shimmer, "The Facts of the Criminal Justice System on the Control of Crime: A Quantitative Approach," L. & Soc'y Rev. 596 (1975).
[10] Id.
[11] Institute for Law and Social Research, "Curbing the Repeat Offender: A Strategy for Prosecutors" 1–11 (1977).
[12] Vera Institute of Justice, supra note 8 at 21.

ported to police. Arrests were made in 105,000 cases. Of the 105,000 felony arrests, indictments were obtained in 16,000 cases, leading to 12,000 felony convictions. Of the 12,000 felony convictions, only 4,000 resulted in any prison time whatsoever.[13] The testimony of several district attorneys on the predecessor bill, S. 1688, in the 97th Congress, elucidated several reasons for the inadequate sentencing: the high volume of cases, attitudes of judges, lack of mandatory minimum sentences, and overcrowded prisons.

LONGER SENTENCES FOR CAREER OFFENDERS

Concentrated attention and very long sentences are required in the interest of public safety for those armed repeat offenders who continue to commit serious offenses like robbery. This view is shared not only among prosecutors, such as those who testified before the Subcommittee on Juvenile Justice in the 97th Congress, but also among criminal justice professionals generally. For example, the Attorney General's Task Force on Violent Crime, made up of professional, police, judicial, and other officials from both the state and Federal levels, concluded that not only was more attention needed on the activities of career criminals, but that some of this attention should come from Federal authorities. As Assistant Attorney General D. Lowell Jensen stated in his appearance before the Subcommittee on Juvenile Justice on October 26, 1981:

> The Attorney General's Task Force on Violent Crime . . . specifically recommends that the federal system now take up and deal with the notion of career criminals. United States attorneys can construct on an administrative and executive level an approach to career criminals, but this bill is the only one that deals with that concept legislatively.([14])

The Attorney General's Task Force on Violent Crime specifically recommended Federal prosecution of firearms possession cases involving persons with prior convictions. The recommendation (Recommendation 21) is based on the successful practice in a number of cities. In its report, the Task Force cited two primary advantages of shifting these cases into the Federal court: (1) faster trial, since in many cities the Federal court dockets are far less crowded than those of the state court, and (2) longer sentences. By contrast, many state courts face huge backlogs, often are unable to schedule trials for months, must continue many cases on the trial date, often pool cases, permit judge-shopping, and encourage guilty pleas to vastly reduced charges. All these factors work to the career criminal's advantage.

FEDERAL VERSUS STATE PROSECUTIONS

Under the Speedy Trial Act, Federal bank robbery prosecutions are routinely completed within ninety days of initiation, whereas state bank robbery cases in many places take a year or more to try. The average time served nationwide for state robbery convictions is 36

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[13] New York Times Magazine, September 27, 1981, at 120–21.
[14] Hearings on S. 1688, S. 1689, and S. 1690 before the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary, 97th Congress, 1st session 14.

months. According to a recent FBI survey, the average sentence imposed for Federal bank robbery convictions is more than twelve years. Although "street" robberies and bank robberies are not precisely comparable, any more than sentences served are comparable to sentences pronounced, the figures nevertheless illustrate the large gap between state and Federal courts: generally speaking trials are much faster and sentences, longer, in Federal courts.

Effect of the legislation

S. 52 creates a new Federal crime. It does not simply provide for punishment of offenders on the basis of their having violated state law. Like the Racketeer Influenced and Corrupt Organizations statute (RICO), it creates a separate Federal offense based on state and/or Federal violations and certain additional circumstances. Accordingly, those to whom the Act is applied would be indicted and tried like other Federal defendants. The Federal Rules of Criminal Procedure and the Rules of Evidence would apply.

The punishment of imprisonment for at least fifteen years is based entirely on the present offense, not on the defendant's "status" as a "career criminal." Nor is it retroactive enhanced punishment for the prior offenses. Whether the prior burglary and robbery convictions resulted in probation, suspended sentence, misdemeanor sentence, or state prison sentence makes no difference. Whatever punishment was imposed by the state court is totally unaffected by application of S. 52. While the punishment imposed by the Federal court is based entirely on the transaction constituting the third or subsequent robbery or burglary, prior convictions are essential to the Federal jurisdiction over the person and hence to the applicability of the minimum sentence. In this regard, S. 52 is much like the Dangerous Special Drug Offender provision, 21 U.S.C. 849, which authorizes enhanced penalties for those convicted under that Act in the Federal courts, who have previously been convicted of drug offenses in the state courts.

S. 52 EXTENDS PRESENT FEDERAL JURISDICTION OVER FIREARMS OFFENSES INVOLVING ROBBERIES AND BURGLARIES

S. 52 extends Federal firearms offense jurisdiction to those participating in armed robberies or burglaries while having the requisite prior convictions. The prior felony convictions can be either for robbery or burglary or a combination of robberies or burglaries. It does not matter whether the prior robberies and burglaries were in the same state or the same county. Federal convictions also count with respect to the prior convictions, as do Federal violations with respect to the current charge. Thus, a career criminal who is convicted in state A of burglary and then in the Federal court of bank robbery, and who then commits an armed burglary in state B, would be covered by the bill.

LIMITED BAIL

S. 52 provides that bail shall be granted as provided by section 3148 of title 18 of the United States Code. That provision, which applies in capital and post-conviction cases, is the only current Federal statute of nationwide application that specifically authorizes the

court to consider the dangerousness of the offender in making the determination whether or not to release a defendant pending trial. S. 52 thus provides a lawful basis for pretrial detention of dangerous offenders in appropriate cases. Therefore, even if trial delays and sentences were the same in Federal and state court in a particular jurisdiction, a local prosecutor and the Attorney General's designee might agree to prosecute an offender under the proposed Section in order to take advantage of the pretrial detention provision.

SENTENCES OF 15 YEARS OR MORE ARE MANDATORY

While the bail provision of S. 52 is permissive, merely authorizing the court to deny bail, the sentencing provision is mandatory. It requires a minimum sentence of at least 15 years. It authorizes a sentence for any term of years greater than 15 years, or for life. In no event, however, may the court impose a term of imprisonment of less than 15 years. This prohibition against short sentences would apply whether the defendant pleads guilty or is convicted following a trial. In this way, the bill precludes excessive plea bargaining as to the sentence as well as the risk of an individual Federal judge imposing an unduly short sentence following a trial. The goal of S. 52 is to incapacitate the armed career criminal for the rest of the normal time span of his career. Hence, the length of the mandatory minimum was set at 15 years.

EXPEDITING COMPLETION OF CASES

To encourage the speediest possible disposition, S. 52 relies both on the requirements of the Speedy Trial Act and on its own provision directing still faster conclusion of trials and appeals. Under the Speedy Trial Act, defendants indicated under S. 52 must be tried within seventy days of indictment. 18 U.S.C. 3161(c). By requiring that the persons prosecuted under the bill be "tried expeditiously," the Committee intends that the court place prosecutions under this Act ahead of others and ensure trial in a still shorter time frame.

While neither the Speedy Trial Act nor any other Federal statute establishes maximum time limits for appeals from criminal convictions, S. 52 expresses the intent of Congress that "the appeal of any person prosecuted under Section 2118 of title 18, United States Code, ass added by this Act, shall be expedited in every way." Again, the intention is that whatever the average time frame, appeals from convictions under this Act would be treated specially and concluded sooner, i.e., at the earliest possible time.

THE SENTENCE IMPOSED MUST ACTUALLY BE SERVED

The defendant would be required to complete the full term of imprisonment imposed by the court. S. 52 expressly prohibits the court from placing a defendant on probation, from suspending sentence, or paroling the defendant prior to the completion of his full term. Persons convicted under S. 52 would simply be ineligible for parole. In short, the bill seeks to improve public safety and reduce violent crime by incapacitating career criminals through lengthy incarceration.

SUPPLEMENTING STATE PROSECUTIONS AS NEEDED

S. 52 is intended to supplement state prosecutions, not to supercede them. Wherever armed robbers and burglars are all being successfully prosecuted in the state systems, S. 52 simply would not be utilized because there would be no incentive for the state prosecuting authorities to request Federal intervention. In those jurisdictions, those times, and those specific types of armed robberies and burglaries where the results in the state courts are not adequate, S. 52 would provide an auxiliary means for protecting public safety.

Ideally, each major armed felony ought to be tried in the court system which is more likely to assure a just and speedy result. The Committee believes that through consultation, the District Attorney and the Attorney General's designee could readily assess the prospects for a given case in their respective court systems. They could then jointly agree which cases warrant transfer to the Federal system.

THE LOCAL PROSECUTOR HAS PRIMARY CONTROL

S. 52 contemplates that prosecutions under the Act will be initiated upon request of the local prosecuting authority. Section 4 of the bill expresses the intent of Congress in this regard by requiring the request of concurrence of the local prosecutor. The Committee assumes that the procedures would be the same as those used for bank robberies, which likewise constitute Federal as well as State offenses. The division of labor between the Federal and local prosecutor could be broad categories of cases and case-by-case review. The Law Enforce- achieved through a combination of establishing general guidelines for broad categories of cases and case-by-case review. The Law Enforcement Coordinating Committees, which the Attorney General has established in each Federal district, would offer an appropriate forum for discussions and actions leading to such mutually acceptable guidelines and mechanisms for reviewing individual cases.

WHO IS COVERED BY S. 52?

The bill applies to any person who participates in an armed robbery or burglary if that person has been convicted of robbery or burglary on two or more occasions in the past. The nature of the career criminal's participation in the in the new offense does not matter. The bill includes those who commit a completed offense and also those who are involved in an attempt. Finally, it includes all those who conspire to commit the offense. Similarly, the prior convictions can be for actual commission of robberies or burglaries, or conspiracies or attempts to commit such offenses.

While the bill requires that the present offense involve the carrying of a firearm (or a destructive device, such as a bomb), it does not require that each career criminal personally possess a gun. Where multiple perpetrators commit a robbery, for examples of a restaurant or business office, not all of the members of the robbery gang may carry weapons. Thus, of three robbers who enter a store and a fourth who waits in a getaway car, two of the three in the store may carry guns while the third may be assigned the job of carrying the bags of money

taken from the office safe. The driver of the getaway car may also be unarmed. It may nevertheless be clear to all participants in the robbery that firearms will be carried. Since this also poses a danger to the innocent public, it should also be punished.

THE BILL WOULD SHIFT PROSECUTIONS, NOT INVESTIGATIONS

The typical case eligible for prosecution under S. 52 would arise in the following manner. First, local police would apprehend a criminal during the course of an armed robbery or burglary. They would seize the weapon and the stolen property and arrest the offender or offenders. Charges would be initiated in the local courts and the reports of the incident and any subsequent investigation would be forwarded to the local District Attorney for his review for the filing of formal court charges, usually by indictment. Up to this point, there would be no involvement by either Federal investigative or prosecutorial authorities. Indeed, it is likely that Federal officials would be unaware of the case. When the District Attorney or his assistants review the case for state indictment, they would also determine whether Federal prosecution would appear advantageous. Where there is no great advantage or need for Federal prosecution, the case would simply proceed in the ordinary course in the state court system. However, if the District Attorney determined that he could not achieve an adequately rapid trial or a sufficient sentence, or could not obtain pretrial detention of a defendant whose detention was essential to public safety, then the case might be referred for Federal prosecution. Ordinarily, the file assembled in the state prosecutor's office would simply be sent to the Federal prosecutor for review.

Where the two prosecutors had previously adopted guidelines as to categories of cases that might be considered appropriate for Federal prosecution, application of these guidelines initially by the District Attorney would facilitate handling the case. Upon receipt of the file, the Federal prosecutor and his assistant would review the reasons why the District Attorney felt the advantages of Federal prosecution were critical for this particular case. Second, they would review the facts of the case and the defendant's record from the standpoint of deciding whether the case is substantial and significant enough to warrant the use of Federal resources and the assertion of Federal criminal jurisdiction. After all, Federal jurisdiction is exceptional and only to be used in appropriate cases, particularly for violent street crime which traditionally has been primarily the responsibility of state authorities. If the Federal prosecutor did not feel the case was significant enough to warrant Federal prosecution, he would immediately return the case to the state where it would be processed in the ordinary manner. If the Federal prosecutor agreed that Federal prosecution should be initiated upon the concurrence of the Attorney General's designee, he would seek Federal indictment.

The indictment would be primarily on the report and evidence forwarded to him by the State prosecutor. Certain follow-up investigations might be conducted by the FBI or other Federal investigative organizations. However, it is not contemplated that such investigative activity would heavily burden the FBI because most of the evidence would have been obtained by the state authorities. They would have

the gun and the stolen property. They could make the local police officers available as witnesses concerning the circumstances of the apprehension, the chain of custody of the physical evidence, and so forth. Likewise, the local police would have interviewed victims and any eyewitnesses to the robbery or burglary and would have provided the Federal prosecutor with information summarizing the prospective testimony of these individuals as well as practical information concerning their whereabouts so they could be summoned as Federal witnesses. In the typical case, the proof would be rather strong. Since burglary and robbery cases are by their nature relatively easy to try, no great difficulty would be presented to Assistant United States Attorneys, even those who may not have prior experience in trying precisely these kind of cases.

PRIOR CONVICTIONS TO BE PROVEN BEFORE TRIAL

The bill contemplates a split proceeding in Federal court. The first part would be an evidentiary hearing and a determination by the court before trial of whether the Government had met its burden of proving the requisite two prior convictions. The second phase would be the jury trial on the present offense. Several factors led the Committee to require determination of prior convictions first. Unlike many state habitual offender statutes, which are merely sentencing enhancement provisions, the prior convictions of this Act are a prerequisite to Federal jurisdiction. Unless the defendant has two valid prior convictions, there is no Federal jurisdiction. Unless proven before trial beyond a reasonable doubt, serious double jeopardy problems could arise should an assumed prior conviction later prove for some reason invalid.

Ordinarily, the prior convictions would be established by the Federal prosecutor with certified court records from the jurisdictions in which the prior convictions were obtained. The defendant could contest the accuracy of such records as provided by law. If the court found any deficiency in the records of the prior convictions, the Federal prosecutor would have to prove them through alternative means or risk the prosecution being aborted. The separate proceeding on the prior convictions is designed primarily to assure fairness in the trial of the defendant. Obviously there is a risk that if the jury were made aware of the prior convictions, it might be influenced in its determination of the proof of the present offense.

EFFECT ON STATE ROBBERY AND BURGLARY LAWS

The bill is not intended to overrule, modify, or in any way affect the application of any state or local criminal statute that covers the same conduct; nor is it intended to overrule or affect the application of other Federal statutes involving the same conduct. Thus, the Federal bank robbery statute, 18 U.S.C. 2113, and the provision of the Hobbs Act concerning robberies which "affect interstate commerce," 18 U.S.C. 1951 would remain unchanged. Therefore, a defendant might be charged not only under S. 52, but also under other Federal statutes which he may have violated by the same transaction. Of course, once convicted of one or more such offenses, the normal limitations on additional punishment for the same transaction would apply. Accordingly, it is contemplated that if charged both under the bank

robbery statute or Hobbs Act and S. 52, the defendant would be sentenced only under S. 52. If prosecuted locally, the defendant would not also be tried Federally—and vice verse. The Act would be used in lieu of state prosecution.

Constitutional basis of the legislation

The constitutionality of S. 52 has been carefully reviewed. The Commerce Clause is sufficiently broad that there is little question of Congress' authority to enact a penal statute concerning the carrying of firearms during robberies and burglaries because of their aggregate effect on interstate commerce.

THE FEDERAL FIREARMS LAW

Federal courts have sustained the authority of Congress to regulate certain intrastate activities involving firearms under 18 U.S.C. 921–28 because these intrastate activities, in the aggregate, have the requisite effect on interstate commerce. In addition, a Federal criminal statute prohibits convicted felons from possessing firearms in interstate commerce. 18 U.S.C. App. 1202.

S. 52 extends Federal criminal penalties to the felonious carrying of a firearm by a convicted felon, which in almost all cases is already a Federal criminal violation. Accordingly, the exercise of power under the Commerce Clause is not much broader under S. 52 than under the existing firearms laws. Since S. 52 requires that the defendant have two or more prior convictions for burglary or robbery, he is usually ineligible under Federal law even to possess the firearm. For the defendant to carry the firearm to commit a further offense which has an impact on interstate commerce simply makes Federal regulation of this activity all the more necessary. As then Assistant Attorney General Jensen noted in his March 18, 1982, testimony before the Subcommittee on Juvenile Justice on the predecessor bill: "the rationale supporting these firms statutes applies equally to the use of a firearm in the commission of an offense as addressed by the bill."

FEDERAL CRIMINAL STATUTES ANALOGOUS TO S. 52

There are numerous Federal criminal statutes which are analogous to S. 52. The Federal bank robbery statute, the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1961–1968, the Hobbs Act, and the Controlled Substances Act of 1970, 21 U.S.C. 801 et seq., are all examples of Congress exercising its broad powers under the Commerce Clause to punish activity which can be intrastate in character, but which also affects interstate commerce.

A more pertinent example is the Federal anti-loan sharking provision, 18 U.S.C. 891–896, which prohibits "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." Nowhere does the statute require that the transaction directly involve interstate commerce, or persons, or organizations, which have an effect on interstate commerce. Therefore, the statute could apply to transactions of a purely intrastate character.

PEREZ V. UNITED STATES UPHELD THE LOAN SHARKING STATUTE

The Supreme Court reviewed precisely this issue in *Perez* v. *United States*, 402 U.S. 146 (1971). The Court agreed that the particular transaction presented by the *Perez* case was purely intrastate, but nevertheless sustained the constitutionality of the statute. The Court indicated that Congress may regulate activities in any of the three following problem areas pursuant to its powers under the Commerce Clause:

(1) the use of channels of commerce which Congress deems are being misused;

(2) protection of the instrumentalities of commerce; and

(3) the activity affects commerce.

The Court further reasoned, that where the activity is one "affecting" interstate commerce, the question for judicial review is simply whether the regulated activity falls within a class that Congress could legitimately conclude to have an effect on interstate commerce. Accordingly, there was no requirement that the individual transaction be specifically shown to affect interstate commerce. It would be sufficient if the class of activities into which that transaction falls has such an effect.

Moreover, the Court indicated that in defining these classes of activity that it seeks to regulate, Congress must be allowed considerable leeway. If the class included activity affecting interstate commerce, the courts will look no further to examine whether the individual transaction itself had such an effect.

Even more clearly than the loan sharking transaction analyzed in *Perez*, the commission of repeated robberies and burglaries plainly is a class of activities that Congress could reasonably conclude "affects" interstate commerce because:

(1) Robberies and burglaries of stores and commercial establishments directly interfere with interstate commerce by increasing the cost of operating businesses.

(2) Robberies and burglaries deter and interfere with travel.

(3) Robberies and burglaries funnel stolen goods into interstate fencing operations, and often the offenders themselves travel in interstate commerce in committing the offenses.

(4) Robberies and burglaries are often motivated by addiction to heroin or other illegal drugs shipped in interstate or foreign commerce, purchased in violation of Federal laws and marketed by organized crime groups, on an international, national, and interstate basis.

(5) Firearms used in such robberies and burglaries have almost invariably either been shipped in interstate commerce or assembled from components which were shipped in interstate commerce.

The nexus to interstate commerce in the case of a typical loan shark transaction is far weaker. There is neither the requirement nor the expectation that the offender will have crossed state lines in the commission of the offense, used instrumentalities of interstate commerce, distributed the proceeds of his criminality in interstate commerce or used a firearm.

ROBBERIES AND BURGLARIES AFFECT INTERSTATE COMMERCE

At least one commentator has suggested that the Commerce Clause is so broad the Congress if it wanted to could criminalize virtually all property crimes. In "The Commerce Clause Revisited—the Federalization of Interstate Commerce," 15 *Ariz. L. R.* 271 (1973), Professor Robert L. Stern noted that, as in the *Perez* case on loan sharking, in any other crimes "probable proof would often make it difficult to differentiate those offenses (property crimes) which affected commerce from those which did not. . . ." [15] Therefore, Congress could create a broad category of offenses because many cases which would fall therein would affect interstate commerce.

MANDATORY SENTENCE NOT UNCONSTITUTIONAL

A constitutional issue might also be raised with regard to the mandatory penalty provision of S. 52. Using prior state convictions to enhance Federal sentencing has ample precedent and is clearly constitutional. For example, in the Dangerous Special Drug Offenders sentencing provision, 21 U.S.C. 849, enhanced sentencing is permitted under certain circumstances for persons found to have been previously convicted in state or Federal court for two or more drug trafficking offenses. This statute has been upheld against the argument that it violates the Double Jeopardy Clause. *Cf., United States* v. *Sierra*, 297 F.2d 531 (2d Cir. 1961), *cert. den.* 369 U.S. 853 (1962).

Similarly the possibility of a life sentence for a third or subsequent burglary or robbery by itself does not present any constitutional infirmity. Indeed, the Supreme Court upheld a state recidivist statute that required a life sentence following a third felony in the face of the argument that in that case imposing a life sentence for three larcenies involving a total of only slightly more than $200 violated the constitutional prohibition against cruel and unusual punishment (*Rummel* v. *Estelle*, 445 U.S. 263 (1980)). Of course, the constitutionality of mandatory sentencing under S. 52 would be decided on a case-by-case basis. *See, e.g., Solem* v. *Helm*, 51 U.S.L.W. 5019 (No. 82–492, June 28, 1983).

21 U.S.C. 849 also provides the precedent for the propriety of basing a specific Federal offense on evidence of a continuing course of conduct in violation of state or Federal law as well as providing for enhanced penalties because of the threat of still further felonies. Finally, under certain circumstances, the Dangerous Special Offender provisions of 18 U.S.C. 3575 likewise permit enhanced sentences for the commission of a Federal crime based on two or more state convictions for dangerous or violent offenses.

V. Agency Views

S. 52 has enjoyed the support of the Department of Justice. During testimony before the Committee on May 26, 1983, Deputy Assistant Attorney General James Knapp indicated that Department's general support for the bill "as a vehicle to allow the Federal Government to assist the states in dealing with the major problems of hardcore recid-

[15] Stern, supra at 283.

ivist robbers and burglars who prey on innocent persons in all parts of this country." Statement at 1.

FEDERAL-LOCAL PROSECUTION RELATIONS

The Department of Justice suggested that the language concerning the requirement of the request or concurrence by the local prosecutor before institution of Federal prosecution be moved from a jurisdictional section the statute of an "intent of Congress" section. The Department's concern was that a state or local prosecutor could simply "veto" any Federal prosecution under the Act even if the Attorney General approved prosecution. Putting such a provision in a Congressional intent section, in the Department's view, avoided "grave constitutional and practical concerns." Statement at 2. S. 52 was amended accordingly.

DETERMINATION OF PRIOR CONVICTIONS

The Department also suggested that the determination of the validity of prior convictions be made before the trial, before jeopardy attaches. Statement at 4. Obvious double jeopardy problems would arise if the validity of the prior convictions was not litigated until during or after trial, and a conviction relied upon proved invalid. The bill has been amended to require a pretrial determination of the validity of the prior convictions.

OTHER CONCERNS

The Department suggested the bill contained some confusion as to the elements of the offense and the interplay of the weapons and burglary or robbery provisions. The amendment remedies this concern by clarifying the fact that carrying a weapon is an element of the offense and by specifically defining robberies and burglaries. Concern was also expressed that the bill should apply to confederates who did not actually carry a gun themselves in committing the crime; it is the intent of the Committee that the bill do so. Finally, the Department recommended Congressional findings to strengthen the Commerce Clause basis of the bill. These were deemed unnecessary in view of the lengthy legislative history surrounding this issue in the 97th and 98th Congress.

VI. Section-by-Section Analysis of S. 52

The following is a section-by-section analysis of S. 52, as amended by an amendment in the nature of a substitute adopted by the Committee on the Judiciary:

Section 1. Section 1 states the short title of the bill: the Armed Career Criminal Act of 1983.

Section 2. Section 2 of the bill amends Chapter 103 of Title 18 of the United States Code by adding a new Section 2118 entitled "Armed Career Criminals."

Proposed Section 2118(a) would make it a Federal offense to carry a firearm during the commission of certain burglaries or robberies or to commit such an offense with another who carries a firearm during its commission, only if the circumstances described in Subsection (b) exist. An attempt or a conspiracy to commit any such offense would

also be punishable. The prescribed penalties are a term of imprisonment of not less than fifteen years and a fine of not more than $25,000.

Proposed Subsection (b) specifies that an individual is only guilty of the aforementioned offense where the United States proves beyond a reasonable doubt that the defendant has been previously convicted of at least two specified robberies or burglaries.

Proposed Subsection (c) describes the underlying offenses as any Federal, State, or local robbery or burglary offense, as defined in Subsections (e)(3) and (e)(4) and discussed more fully below, or a conspiracy or attempt to commit such an offense, if it is punishable by a term of imprisonment exceeding one year. As a result, an individual would only be subject to prosecution under the proposed Section if he had previously been convicted of two felonies and the conduct constituting the third offense was felonious as well. In the Committee's judgment, a person who embarks on a third felony offense of this sort, after two prior convictions, merits the title "career criminal" and should be punished severely.

Although the substance of the offense is virtually identical to that contained in the bill which passed the Senate at the close of the 97th Congress, the Committee made several editorial and technical improvements in order to bring it into line with the drafting conventions of recently passed Federal criminal legislation.

First, the Committee amendment punishes the "carrying" of a firearm during the commission of an offense, rather than the "possession" of a firearm. The conduct which the Committee intends to proscribe is very similar to that punishable under 18 U.S.C. 924(c), which uses the term "carry." [16] Since the definition of that term is a familiar one to Federal prosecutors, the Committee did not wish to create the perception that the proposed offense was intended to cover a different type of conduct. However, the Committee does not intend any substantive difference between the terms "carry" and "possess" in this instance.

While the primary purpose of S. 52 is to punish third-time offenders who carry a firearm during the commission of the offense because of the danger that such persons pose to the community, a person who has previously been convicted of two specified crimes would also be subject to prosecution under the proposed Section if he committed the third offense in the company of an accomplice who carried a firearm. Such conduct would also pose a danger to the community. A prosecution would only be in order where the other party to the offense was a principal in the company of the offender. Obviously, a co-conspirator who sits at home cleaning a firearm while the defendant robs a bank does not pose an increased threat to the community. Thus, that situation does not merit the special treatment which this Act is intended to provide.

S. 52, as introduced in the 98th Congress, did not contain the provision relating to accomplice activity. For the reasons mentioned, and

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[16] The one substantive difference between the offense outlined in the proposed Subsection (a) and the offense contained in existing 18 U.S.C. 924(c) is the requirement in the latter that the firearm be carried "unlawfully." This requirement was not included in the proposed offense because its application was restricted to two offenses which are violent, or potentially violent, by their nature. Under those circumstances, the fact that the firearm was carried lawfully is irrelevant in terms of the public danger that is created. The deletion of the "unlawfully" requirement for certain violent crimes was included in Section 1823 of the Criminal Code Reform Act reported by the Committee in the last Congress (S. 1630) and in Section 2723 of the Criminal Code Revision Act reported by the House Judiciary Committee in the 96th Congress (H.R. 6915).

to the extent described above, the approach contained in the bill sent to the President at the end of the last Congress was considered preferable.

Similarly, the Committee did not include the provision from last year's bill relating to the use of an imitation firearm by the offender or his accomplice. Because S. 52 provides for extraordinary measures, the Committee wishes to restrict its applicability to the most egregious situations endangering community safety.

Both S. 52, as introduced, and the bill from the 97th Congress referred to prior robbery and burglary offenses in violation of the "statutes" of the States and the United States. The bill reported by the Committee refers instead to "laws" of the States and the United States. According to Black's Law Dictionary (5th ed.), the word "statute" is "used to designate the legislatively created laws in contradistinction to court decided or unwritten laws." Because some State burglary and robbery offenses are based on common law, rather than on statute, the generic term "law" was used to ensure that all conduct which the Committee intended to make punishable under the new offense was covered.

The offense described in the proposed Section is punishable by a mandatory term of imprisonment of at least fifteen years. A mandatory term is appropriate in this case because the offender has been convicted of three serious felonies. The mandatory minimum is intended to have not only a strong deterrent effect, but also to deprive the offender of the opportunity to commit additional serious crimes. In the Committee's judgment, a three-time serious offender has demonstrated a sufficient lack of remorse to merit stiff punishment. Furthermore, the determinate nature of such a sentence will provide a more effective deterrent. Although the minimum mandatory sentence is fifteen years, the court in its discretion may impose a longer term of imprisonment up to life. However, any term of imprisonment imposed will be mandatory in its entirety.

The maximum fine which may be imposed in addition to the term of imprisonment is $25,000. This is substantially more than the $10,000 maximum contained in both the 97th Congress bill and S. 52, as introduced. The higher fine comports with the recent tendency to provide for higher fines in connection with Federal offenses and is part of the Committee's desire to provide strong disincentives for choosing a career of crime.

Finally, the amendment in the nature of a substitute, like the 97th Congress bill and S. 52, as introduced, punishes attempts and conspiracies to commit offenses at the same level as the completed offense. This is also a result of the Committee's determination to provide strong deterrents to career crime.

The bill from the 97th Congress and S. 52, as introduced, required "proof of the requisite prior convictions to the court at or before sentencing," but provided that "proof thereof need not be required at trial to establish the jurisdiction of the court or the elements of the offense." Proposed Subsection (b) in the Committee's amendment provides that an offense shall not be prosecuted unless the United States proves beyond a reasonable doubt before trial that the defendant has been previously convicted of two or more specified robbery or burglary offenses. Thus, the defendant's criminal history is

not an element of the crime. Rather, it is a condition precedent to proceeding to trial. The burden of proof of "beyond a reasonable doubt," which was not explicity stated in the 97th Congress bill or in S. 52, as introduced, is included as a further assurance that only the most extraordinary cases will be prosecuted. The Committee envisions that proof of prior convictions will ordinarily consist of certified copies of prior judgments.

Proposed Subsection (c), described in more detail supra, elaborates on the offenses referred to in Subsections (a) and (b).

Proposed Subsection (d) contains four exceptions to other provisions of law. First, Subsection (d)(1) provides that a defendant must be treated in accordance with the provisions of 18 U.S.C. 3148, governing pretrial release in capital cases. In the absence of this exception, under 18 U.S.C. 3146, the judicial officer considering the pretrial release of a person charged as an armed career criminal under the proposed Section would not be able to consider the danger that that person's release might pose to another person or the community, nor would he be permitted to detain that person prior to trial upon finding that no conditions of release would ensure the safety of others, unless obstruction of justice were involved. Persons prosecuted under this Section have, considering their past activities, engaged in conduct which is virtually as serious as a capital crime, and have demonstrated a strong likelihood that their release would pose a further danger to the community. The Federal judicial officer ought to be able to consider that danger in imposing release conditions and in deciding whether the defendant ought to be released prior to trial. The Committee has also reported S. 215, the Bail Reform Act of 1983, which would provide for consideration of danger to the community in other non-capital cases.

Proposed Subsection (d)(2) provides that the indictment or information need not contain allegations pertaining to or references to the requirement that the United States prove beyond a reasonable doubt that the defendant had previously been convicted of two or more felonious robberies or burglaries. This requirement was also contained in S. 52, as introduced, and in the 97th Congress bill, although these previous versions did not contain any specific reference to proceeding by information. The purpose of this provision, like the provision discussed earlier which makes it a precondition for trial, is to make this a question for the court, rather than for the jury. Similarly, Subsection (d)(3) provides that the issue of whether the United States has fulfilled its burden of proof on the question of prior convictions must be decided by the court prior to trial.

Finally, proposed Subsection (d)(4) provides that the court shall not sentence the defendant to probation or suspend his sentence and that the defendant shall not be eligible for release on parole before the end of his sentence. This subsection is intended to ensure that the sentence imposed is indeed mandatory. It thus corrects the error contained in 18 U.S.C. 924(c), which was intended to impose a mandatory sentence, but does not eliminate parole for the offense. The Committee is currently considering that defect in the context of other legislation (S. 914).

Proposed 18 U.S.C. 2118(e) contains definitions which are applicable to the new offense. Subsection (e)(1) defines a "State" to mean

any State of the United States, any political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States. By virtue of this definition, persons convicted of local felonious robberies and burglaries will also be eligible for treatment under this Act. This was not entirely clear in the 97th Congress bill or in S. 52, as introduced, which did not contain references to the political subdivision of a State.

Proposed Subsection (e)(2) incorporates by reference the definition of "firearm" contained in 18 U.S.C. 921(a)(3). Thus, it includes (A) any weapon, including a starter gun, which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive, (B) the frame or receiver of any such weapon, (C) any firearm muffler or firearm silencer, or (D) any destructive device, as that term is defined in 18 U.S.C. 921(a)(4). It would not include an antique firearm, as that term is defined in 18 U.S.C. 921(a)(16). The incorporation of this definition by reference makes the new offense applicable to the same sorts of weapons whose misuse is punishable under 18 U.S.C. 924(c).

Proposed Subsections (e)(3) and (e)(4), which define robbery and burglary offenses for purposes of the Section, were not contained in either the 97th Congress bill, nor in S. 52, as introduced. Because of the wide variation among states and localities in the ways that offenses are labeled, the absence of definitions raised the possibility that culpable offenders might escape punishment on a technicality. For instance, the common law definition of burglary includes a requirement that the offense be committed during the nighttime and with respect to a dwelling. However, for purposes of this Act, such limitations are not appropriate. Furthermore, in terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases.

Accordingly, Subsection (e)(3) defines a "robbery offense" to mean any offense involving the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury. This definition is taken from Section 1721(a) of the Criminal Code Reform Act of 1981 (S. 1630), reported by the Committee on December 22, 1981, and discussed in more detail in the Committee's report.[17] The Committee intends that the states of mind required in connection with that offense under the conventions of Chapter 3 of that Act be applicable here as well.

Subsection (e)(4) defines a "burglary offense" as one involving entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a State or Federal offense. This is essentially the offense entitled "criminal entry" from Section 1712 of the Criminal Code Reform Act, which is discussed in more detail in the Committee's report.[18] Again, the states of mind applicable there would be appropriate here.[19]

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[17] S. Rept. No. 97-307 at 668-679.

[18] *Id.* at 654-75.

[19] The difference between the "criminal entry" and "burglary" offenses in the Criminal Code Reform Act is the requirement of the latter that the offense be committed during the "nighttime," which is not appropriate in this context.

Proposed Subsection (f) provides that, unless expressly indicated to the contrary, the Section does not operate to the exclusion of any other Federal or State law, nor does it invalidate any such law. The purpose of this provision is to clarify the fact that Section 2118 would not supercede any other applicable State, Federal, or local offense and would not prohibit the prosecution of any other relevant offense. This provision was contained both in the 97th Congress bill and in S. 52, as introduced.

Section 3. Section 3 of the bill amends the Table of Sections at the beginning of Chapter 103 of Title 18 to reflect the addition of the new Section.

Section 4. Section 4 contains four important expressions of Congressional intent which are crucial to an understanding of the Act and the circumstances under which it can be utilized.

Section 4(a) of the reported bill expresses the intent of Congress that trials and appeals of persons prosecuted under proposed 18 U.S.C. 2118 should be expedited in every way. The purpose of this is to insure that armed career criminals are incarcerated as fairly, but as promptly as possible in order to remove that danger to the public safety. Such cases would therefore be given priority on the criminal and appeals calendars. This provision was contained in S. 52, as introduced, and in the 97th Congress bill.

Section 4(b) of the Act expresses the Congress' intent that the new Section is not intended to create any enforceable rights in any person. Specifically, it would not authorize a cause of action by a defendant concerning the forum in which he was prosecuted.

Finally, Section 4(c) of the Act specifies the extraordinary circumstances under which an offense might be prosecuted under this Act when the third robbery or burglary offense is a State or local, rather than a Federal, offense. Specifically, it provides that armed robbery and burglary offenses (except where they are specifically covered under Federal law, such as the bank robbery offense in 18 U.S.C. 2113) should ordinarily be prosecuted by the States and that prosecutions under the proposed Section should take place only where the circumstances justify exceptional handling. Thus, offenses should not be prosecuted under that Section unless the appropriate State prosecuting authority requests or concurs in such prosecution and the Attorney General or his designee concurs in such prosecution. These requirements are intended to ensure that prosecutions take place only where the appropriate State or local authority and the Attorney General agree that the case is an exceptional one which would justify Federal intervention. Examples of the types of cases where such intervention would be appropriate include situations where the offender commits offenses in several States, thus creating investigatory and prosecutorial difficulties for the local authorities, where the State authorities believe that the danger posed to the community by a certain career criminal would be better and more quickly addressed by employing Federal resources than by relying on clogged State court systems, and where the Federal prisons are not suffering from the same overcrowding problems as the State counterparts.

Although the requirement of local concurrence is included as an expression of Congressional intent, rather than as a requirement of the offense itself, the Committee cannot envision a situation where

Federal intervention would be appropriate in the absence of some affirmative gesture from the State involved. Under no circumstances is this Section to be used by prosecutors on the Federal level where State and local prosecuting authorities, in their judgment, stand ready, willing and able to handle the investigation and prosecution of the offense. The Committee believes that a small number of prosecutions requested by the States each year (such as the estimate of 500 offered by the Department of Justice) will serve to provide the effective deterrent to armed career criminals that this Act was intended to be.

VII. Regulatory Impact Statement

In compliance with paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee has concluded that the bill will have no regulatory impact.

VIII. Cost of Legislation

In accordance with paragraph 11(a), rule XXVI of the Standing Rules of the Senate, the Committee offers the following report of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., June 21, 1983.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary, U.S. Senate,
Dirksen Senate Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 52, the Armed Career Criminal Act of 1983, as ordered reported by the Senate Committee on the Judiciary, June 16, 1983.

Under this bill, any person involved in an armed robbery or burglary in violation of federal or state law may be prosecuted for the offense in a federal court if the United States can prove beyond a reasonable doubt that the person has at least two prior convictions for robbery or burglary. It specifies that the United States may not prosecute such cases unless the local prosecuting attorney requests or concurs in federal prosecution and the Attorney General or his designee concurs in the prosecution. The bill also prohibits the courts from sentencing defendants prosecuted under this bill to probation or suspending the defendant's sentence. Further, defendants prosecuted and incarcerated under this bill are not eligible for parole.

Because the number of prosecutions and subsequent convictions resulting from the bill depend on discretionary actions taken by the Department of Justice, the states, and the courts, it is difficult to estimate the effect of the bill on the federal government's legal and penal systems. Based on information provided by the Justice Department, it is assumed that approximately 500 cases will be prosecuted by the federal government each year, with 400 resulting in conviction. It is expected that these cases would be undertaken in lieu of cases that would otherwise be prosecuted under existing federal laws. Under these assumptions, there would be no significant increase in the costs of the Department's investigations or prosecutions.

Most of the increased costs to the federal government result from the bill's mandatory sentencing requirement. Successful prosecution of these cases would result in prison terms of at least fifteen years, compared to an average sentence of four years for felony convictions under existing law. Based on an expected average cost per prisoner of over $14,000 in fiscal year 1984, gradually rising in subsequent years, the operating costs of the federal prison system are estimated to increase by approximately $0.3 million in fiscal year 1986, $2 million in 1987, $5 million in 1988, and by increasing amounts in subsequent years. It also is likely that additional federal prison space would be required in future years in order to accommodate the increased number of long-term inmates.

Because the bill transfers responsibility for certain defendants from state and local criminal justice institutions to the federal government, state and local governments could realize budgetary savings as a result of the bill. However, CBO does not expect these savings to be significant.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12, rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 52, as reported, are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

* * * * * * *

CHAPTER 103.—ROBBERY AND BURGLARY

Sec.
2111. Special maritime and territorial jurisdiction.
2112. Personal property of United States.
2113. Bank robbery and incidental crimes.
2114. Mail, money, or other property of United States.
2115. Post office.
2116. Railway or steamboat post office.
2117. Breaking or entering carrier facilities.
2118. Armed Career Criminals.

* * * * * * *

§ 2118. Armed Career Criminals

(a) Whoever carries a firearm during the commission of an offense described in subsection (c) of this section or commits such an offense

with another who carries a firearm during the commission of such offense, or attempts or conspires to do so, shall be fined not more than $25,000 and imprisoned not less than fifteen years.

(b) An offense under this section shall not be prosecuted unless the United States proves beyond a reasonable doubt that the defendant has been convicted of at least two offenses described in subsection (c) of this section.

(c) The offense referred to in subsections (a) and (b) of this section is any robbery or burglary offense, or a conspiracy or attempt to commit such an offense, which may be prosecuted in a court of any State or of the United States and which is punishable by a term of imprisonment exceeding one year.

(d) Notwithstanding any other provision of law—

(1) any person charged with an offense under this section shall be treated in accordance with the provisions of section 3148 of this title;

(2) the indictment or the information need not contain allegations pertaining to or references to subsection (b) of this section;

(3) the issue of whether the United States has fulfilled its burden of proof beyond a reasonable doubt under subsection (b) of this section shall be heard and decided by the court before trial; and

(4) the court shall not sentence the defendant to probation, nor suspend such sentence, and the defendant shall not be eligible for release on parole before the end of such sentence.

(e) For purposes of this section—

(1) "State" means any State of the United States, any political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States;

(2) "firearm" has the meaning set forth in section 921 of this title;

(3) "robbery offense" means any offense involving the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury; and

(4) "burglary offense" means any offense involving entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense.

(f) Except as expressly provided herein, no provision of this section shall operate to the exclusion of any other Federal or State law, nor shall any provision be construed to invalidate any other provision of Federal or State law.

○